

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IDENTITY ARTS, a California Limited
Liability Company,

Plaintiff,

v.

BEST BUY ENTERPRISE SERVICES
INC., a Minnesota Corporation, et al.,

Defendants.

No. C 05-4656 PJH
No. C 06-1631 PJH

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTIONS FOR
JUDGMENT ON THE PLEADINGS**

GEE JEFFERY & PARTNERS
ADVERTISING, INC.,

Plaintiff,

v.

BEST BUY CO., INC., et al.,

Defendants.

Defendants' motions for judgment on the pleadings in the above consolidated cases came on for hearing before this court on November 29, 2006. In connection with Identity Arts, LLC v. Best Buy Enter. Servs., Inc., et al. ("Best Buy I"), plaintiff Identity Arts, LLC ("Identity Arts") appeared through its counsel, Drexel A. Bradshaw and Scott Friedman. Defendants Best Buy Enterprise Services, Inc. and Best Buy Co., Inc. (collectively "Best Buy") appeared through their counsel, David Martinez. In connection with Gee Jeffery & Partners Advertising, Inc. v. Best Buy Enterprise Serv., Inc., et al. ("Best Buy II"), plaintiff Gee Jeffery & Partners ("GJP") appeared through its counsel, David Atlas, Michael E.

1 Dergosits, and Francis X. Dehn. Defendants Best Buy, Identity Arts¹, Sprint Corporation
2 (“Sprint”), and AMC Entertainment, Inc. (“AMC”) appeared through their counsel, David
3 Martinez, Roger Myers, Adam Brezine, and Catherine E. Maxson. Having carefully
4 reviewed the parties’ papers and considered the arguments and the relevant legal
5 authority, and good cause appearing, the court hereby GRANTS defendants’ motions in
6 part and DENIES defendants’ motions in part, for the reasons stated at the hearing, and as
7 follows.

8 **BACKGROUND**

9 The instant actions are based on allegations of copyright infringement. Both actions
10 – which have been related and consolidated for pretrial purposes – are heavily intertwined.
11 The relevant allegations with respect to each are detailed below.

12 **A. Best Buy I**

13 In May 2000, while at a theater presentation of the movie “Gladiator,” David Janssen
14 witnessed a fellow movie-goer being harassed and heckled for receiving a cell phone call
15 mid-movie. See Second Amended Complaint for Damages and Injunctive Relief for
16 Copyright Infringement, Unfair Competition, Breach of Implied Contract, and Unjust
17 Enrichment (“Best Buy I SAC”), ¶ 16. As a result of that incident, Janssen was struck with
18 an idea – to create faux movie trailers to be shown prior to the commencement of movies,
19 in which cell phone users would be encouraged to shut off their phones. See id. at ¶ 17.

20 To implement his idea, Janssen enlisted the help of friend David Bobrow, and the
21 two began working on plans to film and market a short version of a faux movie trailer known
22 as the “Submarine Spot.” Id. at ¶¶ 19-20. The Submarine Spot features a trailer in which
23 the operators of a submarine are killed when, at a time requiring absolute silence, a cell
24 phone from somewhere in the audience begins to ring. Id. at ¶ 18. In March 2002,
25 Janssen registered a script for the Submarine Spot (“Submarine Spot script”) with the U.S.

26
27 ¹ Also included as part of the Identity Arts defendants are individual defendants
28 David Janssen and David Bobrow.

1 Copyright Office, and that same month, Janssen and Bobrow (along with the help of
2 another friend, Ben Nichols) filmed several scenes of the copyrighted script and edited
3 them into a rough cut of the Submarine Spot. Id. at ¶¶ 21-22. Armed with the rough cut
4 Submarine Spot, Janssen and Bobrow co-founded plaintiff Identity Arts, in order to
5 produce, promote, and sell the rough cut spot to cell phone manufacturers, cell phone
6 service providers, and movie theater chains. Id. at ¶ 23.

7 In June 2003, Identity Arts sent the rough cut Submarine Spot to Best Buy. See
8 Best Buy I SAC, ¶ 25. Thereafter, and throughout 2003, the parties negotiated an
9 agreement whereby they agreed to shorten the rough cut Submarine Spot and turn it into a
10 final Submarine Spot that would be displayed in movie theaters (the "Agreement"). The
11 Agreement was executed by both parties on October 7, 2003. See id. at ¶¶ 26, 37-38.
12 During this negotiation, Identity Arts also alleges that it told Best Buy about a related
13 marketing strategy it had in place to market the Submarine Spot to cell phone
14 manufacturers, cell phone service providers and movie theater chains. Id. at ¶ 26.

15 Throughout October 2003, Identity Arts revised and edited the rough cut Submarine
16 Spot, and turned it into the final Submarine Spot. See id. at ¶ 40. Identity Arts then sent
17 Best Buy the final Submarine Spot on October 28, 2003, advising Best Buy that it had up to
18 10 other ideas for cell phone courtesy messages, similar to the Submarine Spot. Id. at ¶
19 42. Best Buy never took Identity Arts up on those ideas, and never signed any additional
20 license agreements with Identity Arts. See, e.g., id. at ¶¶ 45-46.

21 Instead, Identity Arts alleges that after the final Submarine Spot was successfully
22 promoted by Best Buy in AMC movie theaters throughout the country, Best Buy proceeded
23 to introduce other faux movie trailers, including those entitled "The Buffalo" (in which Native
24 Americans are interrupted by cell phone ringing during a buffalo hunt), "Pump up the
25 Movie" (a parody of the "Bring It On" cheerleading movie), and "Return of the Kwan" (a
26 martial-arts themed spot reminiscent of "Crouching Tiger, Hidden Dragon"). See Best Buy I
27 SAC, ¶¶ 47, 49, 56, 64. Identity Arts alleges that each spot is a derivative work of the
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Submarine Spot, nearly identical in their use of story structure, design, and relevant elements. Id. at ¶¶ 50-51, 57-58, 65-66. None of the spots was done with Identity Arts' permission or authorization.

As a result of Best Buy's alleged creation of unauthorized derivative works, Identity Arts filed the Best Buy I action against the Best Buy defendants on November 14, 2005. In its original complaint, Identity Arts asserted five causes of action against the Best Buy defendants: (1) direct copyright infringement; (2) vicarious copyright infringement; (3) contributory copyright infringement; (4) unfair competition under California Business & Professions Code §17200; and (5) unjust enrichment. Identity Arts then requested a preliminary injunction enjoining defendant Best Buy from showing any derivative works of any sort pending resolution of the merits of the action. The court denied Identity Arts' request on February 10, 2006. Immediately following, on February 21, 2006, the court granted a motion to dismiss filed by the Best Buy defendants, and dismissed Identity Arts' fourth and fifth causes of action alleging state law claims, albeit with leave to amend them.

Identity Arts filed the current, and operative, Second Amended Complaint in this action on June 16, 2006.² The SAC alleges the same causes of action as those alleged in its original complaint, and adds one new claim for breach of implied contract (for a total of six causes of action), based on new allegations regarding the marketing strategy that Identity Arts contends it disclosed to Best Buy during negotiations over the agreement between the parties. See Best Buy I SAC, ¶¶ 78-173.

B. Best Buy II

GJP is a Canadian advertising agency. In late 1997, GJP developed a concept aimed at encouraging theater patrons to turn off their cellular telephones during films. See Second Amended Complaint for Damages and Injunctive Relief for Copyright Infringement, Breach of Implied Contract, and Unjust Enrichment ("Best Buy II SAC"), ¶ 16. The concept

² Prior to the filing of Identity Arts' SAC, on January 30, 2006, Identity Arts registered the copyrights for both the rough cut Submarine Spot, and the final Submarine Spot. See Best Buy I SAC, ¶¶ 71-72.

1 involved the creation of several high quality, short films, about 2 minutes in length, that
2 would be shown in theaters. See id. at ¶ 17. The spots would be made to look like movie
3 trailers for coming attractions, but at the end of the trailer, the movie audience would
4 discover that the trailer was in reality a courtesy message asking the audience to turn off
5 cell phones during the movie. Id. Each spot was to be tagged with the name and logo of a
6 sponsor, and GJP's plan was to market these spots through license agreements to different
7 and multiple sponsors. Id.

8 Over time, GJP produced three spots – “Phone Bomb,” “Action Fighter,” and “Cell
9 Block.” See id. at ¶¶ 19-21. Phone Bomb depicts a team of uniformed military-esque men
10 under tense circumstances trying to prevent a sound-sensitive weapon from exploding. At
11 the crucial moment, the plot is disrupted by a ringing cell phone. Id. at ¶ 20. Action Fighter
12 involves a martial arts sequence and story line, which is also interrupted by a ringing cell
13 phone. See Best Buy II SAC, ¶¶ 21, 32. Cell Block is also structured in a similar way. Id.
14 at ¶ 21.

15 GJP alleges that, since 1998, it has held out Phone Bomb, Action Fighter, and Cell
16 Block to the advertising industry and to potential clients as an example of GJP's creativity
17 and work product. See id. at ¶ 24. Since that time, it has also licensed all three spots to
18 advertisers in various countries, generating revenues for GJP, as well as recognition and
19 praise for its creative advertising. Id.

20 On November 1, 2000, a GJP partner attended a meeting in Cincinnati, which was
21 also attended by senior executives from defendants Sprint and Best Buy. See Best Buy II
22 SAC, ¶ 25. GJP alleges that at this meeting, it exhibited Phone Bomb, Action Fighter, and
23 Cell Block, and furthermore advised all present at the meeting that all spots were available
24 to be licensed for use in the United States. Id. GJP asserts that, at the meeting, David
25 Sprosty, a Best Buy merchandise manager, expressed “keen interest” in the spots, and
26 asked if he could take the videotape containing all three spots back to Best Buy to show to
27 his colleagues. Id. at ¶ 27. GJP gave him the videotape, but never heard from him again.

1 Id. at ¶ 28.

2 Subsequently, GJP learned that Best Buy had partnered with Sprint and AMC to
3 produce and exhibit its own faux movie trailers in theaters in the United States. Best Buy II
4 SAC, ¶ 29. GJP specifically learned that these defendants had produced and were
5 exhibiting the Submarine Spot, and Return of the Kwan. Id. GJP alleges that both are
6 substantial copies of Phone Bomb and Action Fighter. See id. at ¶ 30. Although GJP
7 alleges that Identity Arts is the original author of Submarine Spot, GJP alleges that Identity
8 Arts themselves copied Phone Bomb in order to work in concert with defendants to copy
9 GJP's works. Id. at ¶¶ 34-37. GJP's works are registered with the US Copyright Office.
10 Id. at ¶ 40.

11 GJP filed its original complaint against all defendants in federal court in New York on
12 December 15, 2006. The case was then transferred to this court for consolidation with
13 Best Buy I, on March 1, 2006. GJP has since filed subsequent complaints, and the current
14 operative complaint is the Second Amended Complaint, filed on August 4, 2006. The
15 second amended complaint alleges four causes of action against defendants: (1) copyright
16 infringement (against all defendants); (2) copyright infringement (against Best Buy, Sprint,
17 and AMC); (3) breach of implied contract (against Best Buy and Sprint); and (4) unjust
18 enrichment (against Best Buy and Sprint). See Best Buy II SAC, ¶¶ 41-71.

19 C. Instant Motions

20 The Best Buy I and Best Buy II defendants have moved for judgment on the
21 pleadings pursuant to Federal Rule of Civil Procedure 12(c). In the Best Buy I action, the
22 Best Buy defendants jointly move for judgment on the pleadings with respect to all six
23 causes of action brought by plaintiff Identity Arts. In the Best Buy II action, three different
24 motions for judgment on the pleadings have been filed: (1) a motion brought by defendant
25 Identity Arts; (2) a motion brought by defendant AMC ; and (3) a motion brought jointly by
26 the Best Buy defendants and defendant Sprint. The AMC and Identity Arts defendants
27 move for judgment with respect to the federal copyright claims only, while the Best Buy and
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Sprint defendants move for judgment with respect to all four causes of action.³

DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 12(c) provides that any party may move for judgment on the pleadings “after the pleadings are closed, but within such time as not to delay the trial.” See Fed. R. Civ. Proc. 12(c). A motion for judgment on the pleadings challenges the legal sufficiency of the opposing party’s pleadings, and the allegations contained therein.

The standard applied by court in treating a motion for judgment on the pleadings is the same as that applied by the court in considering motions to dismiss under FRCP 12(b)(6). In short, judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. See, e.g., Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1989).

B. Best Buy I

The Best Buy defendants have moved for judgment on the pleadings with respect to all six causes of action alleged in Identity Arts’ second amended complaint. Defendants seek dismissal of plaintiff’s federal copyright claims for three reasons: (1) plaintiff lacks standing; (2) plaintiff’s allegations fail to establish any substantial similarity of protected expression; and (3) even if plaintiff’s ideas and concepts are copyrightable, plaintiff granted Best Buy a license to use plaintiff’s concept. As for plaintiff’s remaining state law claims,

³ The parties in both actions have also filed requests for judicial notice. In the Best Buy I action, plaintiff Identity Arts seeks to have the court take judicial notice of the Declaration of Robert Viannello, submitted in connection with plaintiff’s earlier motion for preliminary injunction. The Best Buy defendants seek to have the court take judicial notice of several prior orders and pleading in connection with the prior motion for preliminary injunction. The court hereby GRANTS both parties’ requests. In the Best Buy II action, defendant AMC seeks to have the court take judicial notice of the second amended complaint filed in the Best Buy I action, and the Best Buy and Sprint defendants seek judicial notice of certain pleadings and orders filed in both the Best Buy I and Best Buy II actions. The court also GRANTS the parties’ requests.

1 defendants argue that plaintiff's claims are preempted by federal copyright law, and
2 additionally fail to state a claim for other reasons.

3 In sum, therefore, resolution of defendants' motion here requires analysis of the
4 following: (1) whether plaintiff's copyright causes of action fail for lack of standing; (2)
5 whether plaintiff's copyright causes of action fail for lack of substantial similarity between
6 works; (3) whether plaintiff's copyright causes of action fail pursuant to the license
7 agreement between the parties; (4) whether plaintiff's state law claims fail on preemption
8 grounds; and (5) whether plaintiff's state law claims individually fail on their merits.

9 A few preliminary points are in order, however. First, it is worth noting at the outset
10 that, as the Best Buy defendants point out in their motion, many of the arguments at issue
11 here were previously considered by the court, in connection with either plaintiff's earlier
12 motion for preliminary injunction, or defendants' earlier motion to dismiss. Accordingly, to
13 the extent certain issues are relevant and have already been decided by the court, the
14 court relies on its prior orders, as indicated more fully below.

15 Second, *both* Best Buy I and Best Buy II plaintiffs make much of the procedural
16 argument that decisions as to copyright infringement – and in particular, substantial
17 similarity issues – are not proper on 12(c) motions for judgment on the pleadings. Plaintiffs
18 are correct that many times, the issue of substantial similarity is not amenable to resolution
19 without a trial. See, e.g., Frybarger v. International Business Machines Corp., 812 F.2d
20 525, 528 (9th Cir.1987)(summary judgment is not highly favored on issue of substantial
21 similarity). However, summary judgment may be granted if the evidence in the record,
22 combined with every inference reasonably drawn in favor of the non-moving party,
23 demonstrates that no reasonable jury could find substantial similarity. See id.; see also
24 Funky Films, Inc. v. Time Warner Entmt. Co., 462 F.3d 1072, 1076-77 (9th Cir.
25 2006)(“substantial similarity ‘may often be decided as a matter of law’”). It follows,
26 therefore, that judgment on the pleadings may be granted where the facts asserted by the
27 non-moving party in its pleadings – including the attached works themselves – and all
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1 reasonable inferences from those facts, show the absence of substantial similarity. See,
 2 e.g., Christianson v. West Pub. Co., 149 F.2d 202, 203 (9th Cir. 1945)(“There is ample
 3 authority for holding that when the copyrighted work and the alleged infringement are both
 4 before the court, capable of examination and comparison, non-infringement can be
 5 determined on a motion to dismiss”); Cory Van Rijn, Inc. v. Cal. Raisin Advisory Bd., 697 F.
 6 Supp. 1136, 1145 (E.D. Cal. 1987)(granting motion to dismiss based on lack of substantial
 7 similarity). As such, the court finds that it may properly consider the substantial similarity
 8 issue in conjunction with defendants’ motion for judgment on the pleadings. Moreover,
 9 plaintiff Identity Arts itself, while arguing against consideration of the substantial similarity
 10 issue on the instant 12(c) motion, simultaneously argues to the contrary in urging the court
 11 to find a lack of substantial similarity in connection with its own 12(c) motion in the Best Buy
 12 II action.⁴

13 With these observations in mind, the court now turns to the merits of defendants’
 14 12(c) motion in Best Buy I.

15 1. Standing

16 Defendants assert that plaintiff lacks standing because Identity Arts failed to register
 17 the rough cut Submarine Spot and the final Submarine Spot until well after Identity Arts
 18 initiated the Best Buy I action. Identity Arts, while acknowledging that registration occurred
 19 after the filing of its initial complaint – on May 5, 2006 – responds that this court has
 20 previously indicated its willingness to allow a copyright infringement suit to go forward
 21 where registration occurs after the filing of an initial complaint, but before the filing of a
 22 subsequent amended complaint. Here, since registration occurred prior to the filing of the
 23 operative second amended complaint, Identity Arts claims that it has standing to proceed

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 25 ⁴ Indeed, the court notes, as defendants point out, that there is a certain
 26 inconsistency regarding Identity Arts’ arguments before the court: while, as plaintiff, Identity
 27 Arts argues here that substantial similarity exists between the Submarine Spot and defendants’
 28 subsequent spots (i.e., “The Buffalo,” “Pump up the Movie,” and “Return of the Kwan”), it must
 rather awkwardly turn around and argue as a defendant in Best Buy II that the Submarine Spot
 is substantially *dissimilar* from the Phone Bomb and Action Fighter spots.

1 as to this operative complaint.

2 Technically, defendants are correct in their arguments. Registration of a work is a
3 prerequisite to a suit for copyright infringement. See 17 U.S.C. § 411(a). While the court
4 would be within its authority to allow an action to be initiated prior to actual issuance of a
5 registration certificate but *after* the filing of an application for registration, there is a
6 jurisdictional defect under the copyright statutes for actions that are initiated *prior* to the
7 sending of an application for registration and in the absence of a certificate of registration.
8 See *Nimmer on Copyright*, § 7.16[B][1][a]. For that reason, when this issue arose in
9 connection with plaintiff's motion for preliminary injunction, the court held that plaintiff
10 lacked standing to sue for infringement of the two works in question, since at the time,
11 plaintiff had not yet filed an application for registration of the works.

12 Now, however, the facts are somewhat different. Since the court's order on
13 plaintiff's motion for preliminary injunction, Identity Arts actually registered the works in
14 question, then subsequently amended its complaint in order to properly allege registration
15 of the works. Accordingly, the question before the court is whether these new facts alter
16 the court's previous conclusion that plaintiff lacks standing.

17 In support of its position that any prior standing deficiencies have been cured,
18 Identity Arts relies on two district court cases. See *Brush Creek Media, Inc. v. Boujaklian*,
19 2002 WL 1906620 (N.D. Cal. 2002); *Ryan v. Carl Corp.*, 1998 WL 320817 (N.D. Cal. 1998).
20 Plaintiff's reliance on these cases, however, is misplaced. As defendants point out, these
21 cases stand for the opposite proposition as that espoused by Identity Arts – i.e., both cases
22 actually dismissed infringement claims for lack of standing when those actions were filed
23 while an application was pending, but before a certificate of registration had issued. See
24 *Brush Creek Media*, 2002 WL 1906620 at *5 (“[p]laintiff here cannot maintain his copyright
25 infringement claim at this time because [p]laintiff does not yet have a certificate of
26 registration of copyright.”); *Ryan*, 1998 WL 320817 at *3 (granting motion to dismiss as to
27 copyright claims of class members whose copyright applications were still pending before
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1 the Copyright Office when amended complaint was filed).

2 More importantly, neither case addresses the actual question whether an amended
3 complaint filed post-registration suffices to cure lack of standing. Nor does either party set
4 forward any dispositive Ninth Circuit authority on this point. Perhaps the most instructive
5 Ninth Circuit case is Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir.
6 1970), a case previously considered by the court in connection with plaintiff's earlier motion
7 for preliminary injunction. Roth Greeting Cards held that a plaintiff could institute his action
8 as of the day that he filed his application for registration, and that subsequently revised
9 copyright applications as to the same underlying work would relate back to the date of filing
10 of the initial application (where the revisions addressed a prior error). It did not hold,
11 however, that subsequent complaints would relate back to the date of an application for
12 registration where the application was filed after the initial complaint. Moreover, as
13 subsequent district court cases have noted, Roth Greeting Cards pre-dated the 1976
14 Copyright Act, which contained different language in its jurisdiction provision making it clear
15 that a plaintiff's registration certificate must issue prior to initiation of suit. See, e.g., Loree
16 Rodkin Mgmt. Corp. v. Ross-Simons, Inc., 315 F. Supp. 2d 1053, 1055 fn. 1 (C.D. Cal.
17 2004).

18 There does appear to be some persuasive authority, however, for allowing a plaintiff,
19 subsequent to the filing of its original complaint, to register and deposit an allegedly
20 infringed work, and thereafter appropriately amend the complaint, without the necessity of
21 filing a new action. See, e.g., Frankel v. Stein & Day, Inc., 470 F. Supp. 209 (S.D. N.Y.
22 1979); Haan Crafts Corp. v. Craft Masters, Inc., 683 F. Supp. 1234 (N.D. Ind. 1988). The
23 Fifth Circuit, for example, has noted that, while the proper course for a plaintiff who lacks
24 standing due to a jurisdictional defect would appear to be the filing of a new action
25 altogether rather than the filing of an amended complaint, such a distinction is without
26 substance if no prejudice to the defendant is present. See, e.g., Positive Black Talk, Inc. v.
27 Cash Money Records, Inc., 394 F.3d 357, 366-67 (5th Cir. 2004) ("The notion that the
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1 supplemental pleading cures the technical defect, notwithstanding the clear language of
2 [the Copyright Act], is consistent with the principle that technicalities should not prevent
3 litigants from having their cases heard on the merits”).

4 The court finds this reasoning persuasive. While true that copyright registration –
5 and therefore standing – is fundamental to a plaintiff’s ability to bring suit, there is no
6 dispute here that plaintiff has now alleged that such registration has taken place. See, e.g.,
7 Best Buy I SAC, ¶¶ 71-72, 76-77. As such, the jurisdictional defect caused by plaintiff’s
8 earlier failure to register the alleged works has now been cured. Furthermore, even if the
9 court were to grant dismissal of the copyright claims for lack of standing, plaintiff would
10 simply re-file a new action alleging the identical facts already pled in the current second
11 amended complaint with respect to registration of the works in question. This result is
12 inefficient, to say the least. In short, under such circumstances as these, the court finds
13 that plaintiff has cured its previous jurisdictional deficiencies under the Copyright Act with
14 the filing of its second amended complaint alleging registration of relevant works at issue in
15 the action.

16 2. Substantial Similarity

17 In order for plaintiff to succeed on its claims for copyright infringement, plaintiff must
18 demonstrate (1) ownership of a valid copyright; and (2) defendant’s copying of constituent
19 elements of the original work. See, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co.,
20 499 U.S. 340, 361 (1991); Funky Films, 462 F.3d at 1076. For purposes of the instant
21 motion, plaintiff has satisfactorily alleged that it is the owner of a valid copyright in the
22 Submarine Spot. See Best Buy I SAC, ¶¶ 80-82. With respect to the copying element of
23 plaintiff’s infringement claim, neither party disputes that no allegation or evidence of direct
24 copying is present. As such, plaintiff’s proof of infringement will involve a fact-based
25 showing that defendants had access to plaintiff’s work, and that the works in question are
26 “substantially similar.” See Funky Films, 462 F.3d at 1076; see also, e.g., Newton v.
27 Diamond, 349 F.3d 591, 594 (9th Cir. 2003)(“[f]or an unauthorized use of a copyrighted
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1 work to be actionable, there must be substantial similarity between the plaintiff's and the
2 defendants' works").

3 This brings the court to the parties' primary point of debate. For purposes of this
4 motion, defendants do not truly contest whether they had access to plaintiff's Submarine
5 Spot. Rather, their focus is on asserting that no infringement is possible because an
6 objective comparison of the Submarine Spot with the allegedly infringing works – the
7 Return of the Kwan, Buffalo, and Pump up the Movie spots – makes it apparent that there
8 is simply not enough substantial similarity between the elements of the spots for any
9 protectable expression of ideas to exist. Naturally, Identity Arts vigorously resists this
10 argument.

11 Substantial similarity is a highly fact specific inquiry. The Ninth Circuit employs a
12 two-part test for determining whether one work is substantially similar to another. See,
13 e.g., Funky Films, 462 F.3d at 1077; Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir.
14 1990). The test permits a finding of infringement only if a plaintiff proves both substantial
15 similarity of general ideas under an “extrinsic test,” and substantial similarity of the
16 protectable expression of those ideas under an “intrinsic test.” See, e.g., Litchfield v.
17 Speilberg, 736 F.2d 1352 (9th Cir. 1984). The court, however, only applies the extrinsic
18 test; the intrinsic test is exclusively the province of the jury. Funky Films, 462 F.3d at 1077.
19 The extrinsic test focuses on “articulable similarities between the plot, themes, dialogue,
20 mood, setting, pace, characters, and sequence of events” in the works in question. See,
21 e.g., Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994); Metcalf
22 v. Bochco, 294 F.3d 1069, 1073 (9th Cir. 2002). In applying the test, the court must
23 compare, not the basic plot ideas for stories, but the “actual concrete elements that make
24 up the total sequence of events and the relationships between the major characters.”
25 Metcalf, 294 F.3d at 1074 (“[g]eneral plot ideas are not protected by copyright law”); see
26 also Olson v. Nat'l Broadcasting Co., 855 F.2d 1446 (9th Cir. 1988). Expert testimony is
27 relevant in this regard. See Funky Films, 462 F.3d at 1077. The court must also “take care
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1 to inquire only whether the protectable elements, standing alone, are substantially similar,”
 2 for protectable expression includes only the specific details of an author’s rendering of
 3 ideas. See, e.g., id. (scenes a faire, which flow naturally from generic plot lines, are not
 4 protectable).

5 Here, Identity Arts alleges a number of similarities between the Submarine Spot, and
 6 defendants’ spots “The Buffalo,” “Return of the Kwan,” and “Pump Up the Movie.”
 7 Specifically, Identity Arts alleges that a comparison of all works demonstrates use of the
 8 following identical elements:

- 9 • the “use of an original theme focusing on the world of movies;”
- 10 • the “use of a montage of scenes and various cinematic devices to create a
 11 fast pace and tense mood, building to a desired break in the action;”
- 12 • the “use of an off-screen audience member with a cell phone as a central
 13 character;”
- 14 • the “use of unimportant characters to divert attention from the central off-
 15 screen audience character with the cell phone;”
- 16 • the “use of a false setting to prevent the revelation of the central character’s
 17 presence until a desired time;”
- 18 • the “use of a false plot to steer audience focus away from the real plot, while
 19 building suspense, until a desired time;”
- 20 • the use of “a dialogue to break the fourth wall and shift audience focus away
 21 from the false plot at the desired time;”
- 22 • the use of “carefully crafted, screen-based dialogue specifically aimed at
 23 promoting a cell phone manufacturer/distributor/service provider’s produce in
 24 a selfless manner;”
- 25 • and “overall the use of a highly intentional sequence of events geared
 26 towards catching audience attention by falsifying the look and feel of a movie
 27 trailer, maintaining that attention through carefully crated cinematic
 28 techniques and devices, and then capitalizing on that attention to promote a
 cell phone manufacturer/distributor/service provider’s product.”

See Best Buy I SAC, ¶ 43 (collectively referred to as the “Original Elements”).

According to Identity Arts, these Original Elements are expressed in a unique and
 independently created structure, follow a specific creative sequence, and are therefore

1 worthy of copyright protection, whether individually or in combination. Plaintiff argues that
2 from this, it follows that the works themselves, upon close inspection, decisively
3 demonstrate substantial similarity. See, e.g., Identity Arts' Best Buy I Opp. Br. ("Best Buy I
4 Opp. Br.") at 7:22-23, 9:23-24.

5 While there are certain similarities between the works in question, actual analysis
6 of the works in question pursuant to the extrinsic test reveals significant differences and few
7 real similarities between the works as regards to plot, theme, dialogue, mood, setting, pace,
8 characters, and sequence of events.

9 a. plot

10 A work's plot is properly defined as "the sequence of events by which the author
11 expresses his theme or idea...". See, e.g., Shaw v. Lindheim, 919 F.2d at 1363. It refers,
12 in other words, to the story line inherent in a work. The Submarine spot, upon which
13 Identity Arts bases its infringement claim, tells the story of a submarine crew located on a
14 submarine in the deep Pacific. The crew's silent descent in what appear to be hostile
15 conditions is suddenly interrupted by the sound of a ringing cell phone coming from an off-
16 screen audience, and the crew urgently turns to the audience and attempts to silence the
17 sound, even as the ringing destroys the silence on screen and dooms the crew.

18 The Submarine spot must be compared here to defendants' three works – the
19 Buffalo, Return of the Kwan, and Pump Up the Movie. The Buffalo spot tells the story of a
20 Native American tribe approaching the winter months having lost many of its tribe
21 members, presumably due to starvation. The tribe must hunt in order to survive. In the
22 midst of a critical hunt requiring silence, the hunt is interrupted by a ringing cell phone
23 coming from the audience, and as two tribe members turn to the audience in a frantic
24 attempt to silence the noise, the herd of buffalo runs away. The Return of the Kwan
25 depicts yet another story line, belonging to the Asian-inspired martial arts genre. It tells the
26 story of an enemy warrior who returns to a quiet village in a time of peace, to engage in
27 battle with a resident hero. In the midst of the battle between the two characters, the by
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1 now familiar cell phone ringing is heard, and the characters' attention is turned to the
2 audience. The enemy warrior takes advantage of the hero's inattention, and the hero is
3 vanquished. Finally, the Pump Up the Movie spot tells an all-American cheerleading
4 underdog story, in which a young male cheerleader must overcome the skepticism of both
5 fellow cheerleaders and his father in order to realize his cheerleading ambition. At a critical
6 moment during the national cheerleading championships requiring the young cheerleader's
7 attention, cell phone ringing is once again heard from the audience. As all characters in the
8 spot turn to the audience, the young cheerleader's attention is distracted, and his team
9 collapses around him.

10 The sequence of events depicted in all four works in question are decidedly different.
11 The spots each tell different stories, with different characters, who are placed in different
12 situations. To be sure, there are some commonalities. All four spots, for example,
13 although they tell the different stories outlined above, contain a critical moment where those
14 story lines are interrupted with the ringing of a cell phone that appears to be coming from
15 the off-screen audience. And in all four spots, the ringing of the cell phone disrupts the
16 varying story lines, to the detriment of the on-screen characters. Identity Arts, while
17 recognizing that the story lines of the four works are "facially dissimilar," argues that the
18 true plot is actually defined by these similarities, rather than the differences. Specifically,
19 plaintiff claims that the true storyline of the spots is "the story of a movie theater where the
20 movie is interrupted, and the real characters of the movie are adversely affected by a
21 patron's cell phone use." See Best Buy I Opp. Br. at 10:7-10.

22 This, however, is unpersuasive. In making this argument, plaintiff paints with far too
23 broad a brush stroke, and defines the plot of each work in an overly generalized way.
24 Indeed, plaintiff's definition of what the true plot is for each work more appropriately reads
25 as the general idea, or concept, of the works in question – which is the use of a cell phone
26 courtesy message designed to look like a real movie trailer – rather than the story lines. As
27 for the actual *expression* of the fundamental idea in a story line sequence, however – i.e.,
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1 plot – the works are each distinctive and dissimilar, despite the presence of some
2 commonalities like the ringing cell phone and the interaction with the off-screen audience.
3 See, e.g., Shaw, 919 F.2d at 1356 (“[c]opyright law protects an author’s expression; facts
4 and ideas within a work are not protected”).

5 In sum, a comparison of the works in question demonstrates that, contrary to
6 plaintiff’s contention, there is no substantial similarity in the plots of the works in question.
7 To the extent any similarity in plot exists, it is only at the general level for which plaintiff
8 cannot claim copyright protection. See, e.g., Litchfield v. Spielberg, 736 F.2d 1352, 1357
9 (9th Cir. 1984).

10 b. theme

11 Generally speaking, ‘theme’ can be defined as the subject or topic of artistic
12 expression, a point of view embodied upon in a work of art, or even, as Identity Arts
13 asserts, as the “unifying or dominant idea” inherent in a given work. See Best Buy I Opp.
14 Br. at 10:14-15; see also Webster’s II New Riverside University Dictionary (1988).

15 Here, as with the element of plot, the works at issue prove to have distinct themes.
16 The Submarine spot evokes the themes of military warfare, danger, and impending death.
17 The Buffalo spot evokes the themes of tribal community, the hunt, and survival in the wild.
18 As for Return of the Kwan, its theme is that of the ancient warrior hero in peacetime who
19 must conquer his enemy in order to save his village. Finally, Pump Up the Movie evokes
20 the theme of the underdog athlete who must overcome negative expectations and personal
21 challenge in order to realize his athletic dream. None of these themes is substantially
22 similar to any other.

23 Identity Arts attempts to avoid this conclusion by looking once more for an
24 overarching theme capable of tying all spots together. To that end, it states that the true
25 theme of the Submarine spot is really “that each and every moviegoer can be a ‘hero,’ and
26 can protect the well-being of those around them by refraining from cell phone use during
27 the movie,” and that defendants’ spots have the similar themes that “a failure to refrain from
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cell phone use during the movie can have disastrous results,” or that “turning off cell phone can ‘save’ the movie for all movie-goers.” See Best Buy I Opp. Br. at 10:14-16, 10:20-23.

Again, however, as noted in connection with analysis of the plot element, plaintiff urges too broad a definition. While plaintiff is correct that the overall message that all the various spots seek to convey is that cell phone users should refrain from cell phone use during movie showings, this message is part of the overall concept and *idea* for the spots, which is that of a cell phone courtesy message designed to masquerade as a real movie trailer, rather than being expressed as the central theme present in each work. More fundamentally, the message that every movie goer can be a “hero” by turning off their cell phones, simply does not rise to the level of an “actual concrete element[] that make[s] up the total sequence of events and the relationships between the major characters.” See, e.g., Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002).

In sum, even though there may be some commonalities in the overall idea and concept that are expressed by the varying themes, there is no substantial similarity of actual theme between the various works in question.

c. dialogue

Identity Arts contends that there are three substantial similarities apparent in the dialogue that takes place in all four works in question: first, the existence of “asynchronism,” that is, sound that does not originate from the environment depicted on screen. Identity Arts specifically points to the ringing cell phone as proof of asynchronism. Second, all works exhibit the “breaking of the fourth wall” – i.e., the use of dialogue between the on-screen characters and the audience. Finally, Identity Arts claims that the catch phrases “it’s coming from the audience,” or in the alternative, “it’s coming from the theater,” are also elements of dialogue similar to all works.

Plaintiff is correct that there are some similarities present in the dialogue of each spot. Specifically, as plaintiff highlights above, most striking is the dialogue in each spot that corresponds with the moment where the sound of an off-screen ringing cell phone is

1 heard by the on-screen characters of the spots. In the Submarine spot, the cell phone
 2 ringing is heard, and a member of the crew says to the rest of the crew members that the
 3 sound is “coming from the audience.”⁵ In the Buffalo Spot, one hunter says to the other
 4 upon hearing the ringing cell phone, “it’s coming from the audience.” In Return of the
 5 Kwan, which is subtitled, dialogue appears in written format throughout, with the villain
 6 stating “it’s coming from the audience” in response to the ringing phone and the hero’s
 7 question, “did you hear that?” Finally, in Pump Up the Movie, an on-screen character
 8 changes the dialogue slightly when he states, “it’s coming from the theater” after the sound
 9 of the ringing cell phone is heard.

10 These similarities, however, do not rise to the level of substantial similarity. To begin
 11 with, the sound of the ringing cell phone itself cannot be classified as dialogue, and plaintiff
 12 presents no authority for holding that such a sound, even though present in all works at
 13 issue, is protectable. Nor does plaintiff present any support for why the court should hold
 14 that the “breaking of the fourth wall” constitutes substantially similar dialogue. To the
 15 contrary, the breaking of the fourth wall is a cinematic technique, not dialogue. This leaves
 16 the court with the most striking – and only – true similarity in dialogue present: use of the
 17 phrase “it’s coming from the [audience/theater].” As to this phrase, however, there can be
 18 no copyright protection. See, e.g., Narell v. Freeman, 872 F.2d 907, 911 (9th Cir.
 19 1989)(“Ordinary phrases are not entitled to copyright protection.”); see also 37 C.F.R. §
 20 202.1(a)(words and short phrases are not subject to copyright).

21 Moreover, despite the presence of the above similarities in all spots, these
 22 similarities appear in the context of many *differences* in dialogue that are present in the
 23 spots. Since the story lines of each plot are widely divergent, so too, is the dialogue.
 24 Neither the characters’ statements, nor the spot announcer’s statements is the same in any

26 ⁵ The court was unable to distinguish this phrase audibly in the dvd version of the
 27 Submarine spot, submitted as Exhibit C to the Best Buy I SAC. However, since both parties
 28 appear to concede the existence of this phrase in the Submarine spot, the court treats the
 presence of the phrase as a conceded fact for purposes of this motion.

1 of the spots, with the exception of the single phrase, “it’s coming from the
2 [audience/theater],” which has been demonstrated above to fall outside the scope of
3 copyright protection.

4 As such, the court can find no substantial similarity of dialogue present in the spots
5 before it.

6 d. mood

7 Identity Arts defines “mood” as referring to the “prevailing emotional tone or general
8 attitude” exhibited in a given work. According to plaintiff, the prevailing emotional tone of all
9 four works in question here is best described as “tense,” and results from the “fear of
10 impending doom or failure that faces each apparent central character.” See Best Buy I
11 Opp. Br. at 11:16-17. Defendants, by contrast, contend that the mood for each spot is
12 dramatically different. In Submarine, the feeling is one of “suffocating claustrophobia inside
13 a ship and the threat of imminent death.” In Buffalo, the tone is one that “reflects the risk of
14 slow starvation in the wide-open wilderness.” Return of the Kwan exhibits a tone of “one-
15 on-one, hand to hand martial arts surrealism,” while Pump Up the Movie portrays a “light-
16 hearted” mood.

17 Defendants read the mood of the spots in question better than plaintiff. Each spot,
18 which tells a different story and uses different characters in order to tell the story, also
19 carries with it a distinctive mood – i.e., emotional tone. The mood of the Submarine spot is,
20 as plaintiff portrays it, very tense, hair-raising, and suspenseful. The Buffalo, however, is
21 best described as serious, mournful, and dramatic. Return of the Kwan conveys an action-
22 packed mood on the scale of an Asian epic film. Finally, Pump Up the Movie can best be
23 described as conveying a light-hearted mood typical of many coming-of-age sports movies.

24 In sum, the court cannot find any substantial similarity of mood, as exhibited in each
25 work before the court.

26 e. setting

27 As plaintiff notes, “setting” refers to the “scene” in which the works at issue take
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1 place. Plaintiff contends that here, there are *two* relevant settings: an actual setting, and
2 an intentionally false setting. The actual setting is the movie theater in which the spots are
3 playing, and plaintiff points out that this is identical in all four works at issue. As for the
4 intentionally false setting, plaintiff acknowledges that it varies depending on the spot at
5 issue (e.g., submarine ship, wilderness, cheerleading competition), but contends that the
6 use of a false setting in all works is substantially similar.

7 Even taking at face value plaintiff's argument that there are two settings at issue
8 with regard to each work, plaintiff cannot demonstrate substantial similarity among the
9 spots. Plaintiff first claims, for example, that the true setting of each work is the movie
10 theater in which the spot is shown. However, this cannot be; the concept of a work's
11 setting refers to the place described by the work itself. Here, this means the setting
12 exhibited in the story lines themselves, and in the sequence of events that take place within
13 the story line – i.e., the submarine ship, the American wilderness, the Asian village and
14 lake, and the cheerleading competition. If the court were to follow plaintiff's urging and
15 define the actual setting of the spots in question with reference to any given movie theater
16 in which the spots are shown, the line between an artistic performance or showing, and the
17 audience for whom those performances and showings are made, would become
18 meaningless.

19 Moreover, there is no authority that the court has found that would sanction such an
20 approach, and allow or require the court to objectively analyze the element of setting with
21 respect to the actual place in which a work is exhibited. Indeed, to the extent the Ninth
22 Circuit has even considered the setting element with respect to the location in which a work
23 was filmed, it has said that any similarities among film location is "generic and
24 inconsequential" such that it would "fail to meet substantial similarity." See Rice v. Fox
25 Broadcasting Co., 330 F.3d 1170, 1176-77 (9th Cir. 2003). So, too, here. To the extent,
26 therefore, that plaintiff argues that the true setting is the actual movie theater in which the
27 spots are shown, and that all four spots are substantially similar in this regard, the court
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1 rejects plaintiff's argument.

2 This leaves plaintiff with the argument that there are substantial similarities with
3 respect to the intentionally false setting exhibited in all four spots. With respect to this
4 argument, however, plaintiff itself fails to quarrel with the widely divergent settings apparent
5 in the spots. As such, plaintiff concedes the lack of substantial similarity with respect to any
6 protectable elements demonstrating setting among the works in question, and the court
7 further holds that no substantial similarity is present.

8 f. pace

9 Identity Arts argues that the pace of each work before the court is identical, since the
10 pace is intentionally set to "create the look and feel of a movie trailer," "facilitate the
11 montage sequence of events," and "foster the tense mood and apparent conflict." See
12 Best Buy I Opp. Br. at 13:12-15. Defendants concede that all spots do have in common
13 the element of pace, as each is approximately 35 to 45 seconds in length. They assert,
14 however, that this similarity in pace is merely a function of the fact that all spots are
15 presented as movie trailer, which have time restrictions that forcibly limit all spots to similar
16 pace.

17 As both parties note, all spots before the court do, indeed, maintain a similar pace.
18 However, contrary to plaintiff's argument, these similarities are common to any movie
19 trailer, as all movie trailers are necessarily limited in time, as defendants point out. It
20 follows, therefore, that any similarity in pace among the spots at issue here is a similarity
21 that is necessarily derived from and a function of the use of the *idea* of displaying cell
22 phone courtesy messages disguised as real movie trailers. As such, the idea of faux movie
23 trailers, and the 35 to 45 second pace that results from the expression of that idea, are
24 merged, such that any substantial similarity among this element is unprotectable under the
25 copyright laws. See Rice, 330 F.3d at 1175 ("similarities derived from the use of common
26 ideas cannot be protected; otherwise, the first to come up with an idea will corner the
27 market").

1 In short, the court does not find any substantial similarity with regard to pace, in
2 connection with the works in question.

3 g. characters

4 Identity Arts points out that the most important character in all four works is the “in-
5 theater movie patron who fails to silence his/her cell phone before the movie begins.” See
6 Best Buy Opp. Br. at 11:23-25. This off-screen character is the sole basis upon which
7 plaintiff argues that there is substantial similarity of characters in all four works. To the
8 extent that defendants respond by highlighting the obvious presence of numerous varying
9 on-screen characters in the four spots in question, plaintiff dismisses these on-screen
10 characters as incidental and secondary to the true off-screen character of each work.

11 Plaintiff cannot claim substantial similarity based on the presence of an amorphous,
12 unidentified, and undefined off-screen character. To begin with, in order for there to be
13 copyright protection over the similarities present in two or more characters, plaintiff must
14 first be able to demonstrate what the similarities and attributes shared by the characters
15 are. See, e.g., Rice, 330 F.3d at 1176 (analyzing character element of extrinsic test with
16 regard to the “shared attributes of appearance and ... demeanor”). Here, however, plaintiff
17 has not sufficiently identified the central off-screen character by attribute or demeanor, or
18 any other characteristic that would allow the court to extend copyright protection under this
19 element. Indeed, to the extent that plaintiff relies on the general presence of an off-screen
20 audience member as a character in any of the spots, plaintiff is really seeking copyright
21 protection for similarities in characters who are generic and common to all off-screen
22 audience members as a rule of thumb. These generic attributes are not protectable. See
23 id. (“generic and common attributes” to stock characters not protectable).

24 Second, even if such a character were protectable, plaintiff cannot merely sweep
25 aside the presence of so many other varied characters who appear in the differing spots,
26 and whose attributes and demeanor bear no similarity with one another. For example, the
27 submarine crew depicted in the Submarine spot bear no resemblance with or likeness to
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1 the Native American tribal members seen in the Buffalo. Nor do they bear any
2 resemblance to either the hero and villain portrayed in Return of the Kwan, or the young
3 cheerleader in Pump Up the Movie. Accordingly, a review of all the characters who *are*
4 identifiable and concrete, demonstrate that no substantial similarity is present among them.

5 Accordingly, the court finds that plaintiff cannot demonstrate substantial similarity of
6 characters in connection with the spots at issue.

7 h. sequence of events

8 Finally, Identity Arts claims that there is a concrete and unique sequence of events
9 that is present in the Submarine Spot, as well as in defendants' three works. First, the
10 sequence of events is unique, as it is displayed as "a collection of rapidly edited images, to
11 mirror the look and feel of a movie trailer." Second, Identity Arts claims that the sequence
12 of events is displayed in "filmic time" – i.e., in a non-chronological order. Third, the
13 sequence of events in all works is identical, involving: title cards, interspersed with black
14 screens; the introduction of a false scene with on-screen characters; introduction of a false
15 conflict, with on-screen characters who attempt to overcome that conflict; the moment
16 where the success of the on-screen character is prevented due to a ringing cell phone; and
17 the introduction of the central, off-screen character, and the revelation of the true nature of
18 the spot as a courtesy message for patrons. See Best Buy I Opp. Br. at 12:6-14.

19 Defendants, by contrast, point to this sequence of events as a description of generic
20 elements for which copyright protection cannot be invoked.

21 Defendants are correct. The sequence of events that plaintiff describes is not
22 sufficiently unique or concrete enough to warrant copyright protection. Rather, plaintiff
23 once more defines the scope of copyright protection too broadly, and impermissibly seeks
24 protection for the general idea, or concept, of a faux movie trailer whose true nature is a
25 cell phone courtesy message, instead of seeking protection for plaintiff's own *expression* of
26 the same idea. See, e.g., Berkic v. Chricton, 761 F.2d 1289, 1293 (9th Cir. 1985)
27 ("[g]eneral plot ideas are not protected by copyright law; they remain forever the common
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property of artistic mankind.”). For example, plaintiff seeks protection for the collection of “rapidly edited images” that mirror the look of a movie trailer, for the fact that the sequence of events is displayed in “filmic” time, for the use of title cards and black screens, and for the introduction of on-screen characters and the use of dramatic elements to create conflict and a final result of that conflict. These, however, are generic elements and scenes that flow naturally from the basic plot premise of a cell phone courtesy message disguised as a movie trailer. As such, they are unprotected scenes a faire. See, e.g., Metcalf, 294 F.3d at 1074 (copyright law does not protect “scenes a faire, or scenes that flow naturally from unprotectable basic plot premises”). Nearly every movie trailer, for instance, involves the use of rapidly edited images displayed in filmic time, along with the use of title cards, and sufficient introduction of the storyline so as to leave an impression of the story in the viewer’s mind.

To the extent that plaintiff also points to substantial similarities in the sequence of events that do not necessarily invoke the doctrine of scenes a faire – for example, use of the ringing cell phone, and interaction with the off-screen audience character – these similarities are not substantially similar warranting copyright protection, as discussed above.

Accordingly, as with the elements discussed above, the sequence of events invoked by plaintiff cannot, standing alone, support a finding of substantial similarity, when compared with the works in question. They are either too generic, or constitute scenes a faire.

In sum, therefore, after engaging in analysis of all four works in question under the Ninth Circuit’s extrinsic test, the court concludes that no substantial similarity exists over protectable elements of plaintiff’s work. While it is true enough that there is a certain similarity in overall concept and idea – i.e., that all spots are faux movie trailers that show a plot interrupted by a ringing cell phone coming from the audience – the actual specific details of the spots themselves are not substantially similar, nor is their expression of the

1 underlying idea sufficiently similar. The spots use different individual story plots, themes
2 and settings, different characters, and a different sequence of events. To the extent that
3 similarities exist, they are too generic to qualify for protection, or otherwise unprotectable
4 (e.g., scenes a faire). As such, any conclusion that substantial similarity between the spots
5 is present would defy the Ninth Circuit's exhortation that copyright law protects only the
6 *specific* details of an author's rendering of an idea, and not the idea itself.

7 This conclusion is buttressed by the fact that – as noted above – this court has
8 reached this same conclusion once before, in connection with the plaintiff's earlier motion
9 for preliminary injunction. There, the court compared the same spots (although only the
10 Submarine spot script had been properly registered), and held that plaintiff did not have a
11 high likelihood of success in proving substantial similarity. In connection with that motion,
12 the court also rejected plaintiff's proffered expert testimony – a declaration submitted by Mr.
13 Robert Viannello. To the extent, therefore, that plaintiff has attempted to rely on Mr.
14 Viannello's testimony once again here, the court also rejects it, in light of the fact that
15 plaintiff has submitted *the exact same Viannello declaration* before the court that was
16 submitted and rejected earlier.

17 Finally, the court briefly takes note of, and dismisses, two additional arguments that
18 plaintiff makes in a vain attempt to avoid the court's inevitable conclusion with respect to
19 infringement. First, plaintiff argues that it is the combination of all elements that warrants
20 protection, even if the individual elements themselves are not protectable. For support,
21 plaintiff relies on this court's decision in Open Source Yoga Unity v. Bikram Choudhury,
22 2005 WL 756558 (N.D. Cal. 2005), as well as the 2nd Circuit's decision in Matthew Bender
23 v. West Publishing Co., 158 F.3d 674 (2d Cir. 1988). Plaintiff's argument, however, fails.
24 In Open Source Yoga, the court assumed without deciding, that if substantial similarity
25 were found at trial, infringement of the very specific yoga sequences at issue would occur,
26 even though the poses in and of themselves may not be subject to copyright protection.
27 But the court stated that such infringement would occur assuming that the identical
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1 sequences had been copied (providing only a thin copyright protection), and further found
2 that a conclusion of infringement was inappropriate at the summary judgment stage. See
3 Open Source Yoga, 2005 WL 756558 at *4-5. Here, by contrast, as has been discussed
4 above, there is *no* identical duplication in any of defendants' spots, of the same plot or
5 elements contained in the Submarine spot. Nor is there any specifically identifiable
6 sequence that can even be protected, as many of plaintiffs' elements are either stock
7 elements, or simply too generic to merit protection, regardless of their specific combination.
8 Accordingly, there is simply no principle stated in Open Source Yoga that is either helpful or
9 persuasive to plaintiff's case.

10 The same is true of plaintiff's reliance on Matthew Bender, wherein the Second
11 Circuit considered the issue of a written compilation of material related to a case law
12 publishing service. While plaintiff is correct that the Second Circuit found that sufficient
13 creativity in arrangement of a compilation could support an infringement claim, the case
14 dealt with written compilations only, where the actual underlying information of both works
15 in question was indisputably identical (i.e., written information relating to case names,
16 attorney names, etc.). Here, by contrast, as just stated, there is no underlying group of
17 elements or source of information in the Submarine spot that is plainly identical to the other
18 three spots in question, with the exception of the phrase "it's coming from the audience" (a
19 phrase which has already been held insufficient to support an infringement claim). There
20 is, therefore, no basis upon which to place this case into the same category as Matthew
21 Bender and conclude that infringement has taken place on a compilation basis.

22 Second, plaintiff makes the procedural argument that it is entitled to application of
23 the inverse ratio rule here, pursuant to which plaintiff would be entitled to a lower standard
24 of proof on the issue of substantial similarity. See, e.g., Three Boys Music Corp. v. Bolton,
25 212 F.3d 477, 485 (9th Cir. 2000) ("we require a lower standard of proof of substantial
26 similarity when a high degree of access is shown"). To this, however, the court responds,
27 as defendants point out, that "no amount of proof of access will suffice to show copying if
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1 there are no similarities.” See Funky Films, 462 F.3d at 1081. Accordingly, having
2 concluded here that no substantial similarities exist such that copyright protection attaches
3 to plaintiff’s work, plaintiff is not entitled to the benefits of the inverse ratio rule.

4 In conclusion, defendants are correct that plaintiff cannot show substantial similarity,
5 and plaintiff’s inability to do so – and in view of plaintiff’s prior attempts to amend the
6 complaint – warrants entry of judgment on the pleadings in defendants’ favor with respect
7 to plaintiff’s first three causes of action.

8 3. License Agreement

9 Even if the court were not persuaded that no substantial similarity exists between
10 plaintiff’s spot and defendants’ spots, the Best Buy defendants argue that the license
11 agreement between the parties specifically allows defendants to make the faux movie
12 trailers in question, thereby preventing a finding of infringement. Plaintiff, for its part,
13 concedes that the license agreement between the parties does not prohibit defendants
14 from producing their own courtesy message commercials, but asserts that this is different
15 from a grant of express authorization to do so, and further asserts that extrinsic evidence
16 will prove that defendants lacked authorization to prepare the works in question to the
17 extent based on the Submarine spot.

18 Even if the court had not already concluded that the works in question are not
19 substantially similar, it would conclude that the license agreement does, on its face, grant
20 defendants the right to produce the three works at issue. The license agreement – the
21 validity of which plaintiff apparently concedes – is explicit on its face. See Best Buy I SAC,
22 Ex. B. at ¶ 5. It expressly states that, while plaintiff owns all copyright in the Submarine
23 Spot, “Nothing in this Agreement shall preclude Licensee from producing its own or
24 licensing from third parties courtesy message commercials using a theatrical motion picture
25 trailesque theme or style.” Id. This is an express statement giving the Best Buy
26 defendants the right to produce its own faux movie trailer commercials. Since this is
27 precisely what the Buffalo, Return of the Kwan, and Pump up the Movie spots are, then it
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1 follows that defendants were granted the right to make them.

2 Plaintiff invokes the well-established rule that “copyright licenses are assumed to
3 prohibit any use not authorized,” in an attempt to argue that the Agreement must be
4 construed as *prohibiting* defendants from creation and use of their spots. See S.O.S., Inc.
5 v. Payday, Inc., 886 F.2d 1081, 1088 (9th Cir. 1989). Plaintiff contends that this must be
6 so, since the language of the Agreement is not phrased in affirmative granting language,
7 but rather in negative language that merely states that defendants ‘shall not be precluded’
8 from creating and using its own faux movie trailers.

9 The court finds plaintiff’s arguments unpersuasive in this regard. Contrary to
10 plaintiff’s position, the Ninth Circuit in SOS did not find that language in a licensing
11 agreement conveying authorization for use cannot constitute authorization unless
12 expressed in affirmative language. It simply recognized the rule that, unless an agreement
13 expressly grants authorization for use – *regardless* of the language in which the express
14 authorization is couched – the agreement will not be construed as doing so. Here,
15 although the Agreement between the parties does not use affirmative language in granting
16 defendants the right to “produc[e] its own ... courtesy message commercials using a
17 theatrical motion picture trailesque theme or style,” it is nonetheless clear that plaintiff
18 granted defendants the right to use a movie trailer format with a theme or style similar to
19 plaintiff’s Submarine spot. This includes spots such as Buffalo, Return of the Kwan, and
20 Pump Up the Movie.

21 Even, assuming arguendo, that the court narrowly construes the Agreement as
22 granting defendants the limited right to produce movie trailers that use only the same literal
23 “theme” elements as the Submarine spot – and no other elements similar to the Submarine
24 spot – this is still not enough to save plaintiff’s copyright claims. For even if the Agreement
25 only authorized defendants to use a similar theme in their spots, plaintiff would still be
26 required to demonstrate substantial similarity as to the other seven elements evaluated
27 under the extrinsic test, in order to state a valid claim for copyright infringement (e.g., plot,
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1 dialogue, mood, setting, pace, characters, and sequence of events). And as the court
2 explicitly found above, plaintiff has not done, and cannot do so. As such, plaintiff has failed
3 to demonstrate that it can state a claim for copyright infringement, whether the Agreement
4 is construed more broadly as explicitly granting to defendants the right to produce similar
5 cell phone movie trailers, or is more narrowly construed as granting defendants the limited
6 right to produce only similarly ‘themed’ spots.

7 Furthermore, given that the terms of the Agreement are express and unambiguous,
8 plaintiff shall not be allowed to introduce any extrinsic evidence that contradicts the
9 agreement. See A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., 852 F.2d 493, 495 (9th
10 Cir. 1988)(“[E]xtrinsic evidence is not admissible to add to, detract from, or vary the terms
11 of a written contract.”).

12 In sum, therefore, both the law and the Agreement warrant judgment on the
13 pleadings in defendants’ favor with respect plaintiff’s first three claims.

14 4. Preemption of State Law Claims

15 Defendants next turn to plaintiff’s three state law claims for unfair competition,
16 breach of implied contract, and unjust enrichment, and assert that all are preempted.

17 The Copyright Act preempts state law if two conditions are met. The work of
18 authorship must fall within the subject matter of the Copyright Act 17 U.S.C. § 102 (“subject
19 matter”), and the rights that the state law protects must be equivalent to those protected by
20 the Copyright Act, specified in 17 U.S.C. § 106 (“equivalent”). Kodadek v. MTV Networks
21 Inc., 152 F.3d 1209, 1212 (9th Cir. 1998); see also Downing v. Abercrombie & Fitch, 265
22 F.3d 994, 1003 (9th Cir. 2001).

23 The court has considered preemption in the context of this case before. In February
24 2006, the court ruled on defendants’ motion to dismiss plaintiff’s claims for unfair
25 competition and unjust enrichment, and found that they were preempted by the Copyright
26 Act. The court granted leave to amend the complaint, so that plaintiff could try and allege
27 its marketing strategy as the necessary extra element that would allow its state law claims
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1 to fall outside the ambit of the Copyright Act. Plaintiff did so, and added a third breach of
2 implied contract claim.

3 The question now before the court is whether the additional allegations regarding
4 plaintiff's marketing strategy save plaintiff's state law claims from preemption. As plaintiff
5 did previously, it bases all three claims on the same allegations that form the basis for its
6 copyright claims, stating that the Best Buy defendants wrongfully used material protected
7 by the US Copyright laws, and which belonged to Identity Arts. See, e.g., Best Buy I SAC
8 at 21-28. Now, however, plaintiff has included allegations related to its marketing strategy.
9 Specifically, plaintiff alleges: the fact that it had a marketing strategy; the fact that plaintiff
10 provided defendants with its marketing strategies; that plaintiff had a reasonable belief that
11 it would be compensated for providing defendants with knowledge of its marketing strategy;
12 and that the strategy was inappropriately taken and used by defendants. See id.

13 With respect to plaintiff's fourth cause of action for unfair competition pursuant to
14 California Business & Professions Code § 17200 et seq., and plaintiff's sixth cause of
15 action for unjust enrichment, plaintiff's additional allegations do not save the claims from
16 preemption. This is because plaintiff's allegations continue to incorporate references from
17 plaintiff's copyright claims, and continue to be expressly based upon the material covered
18 by plaintiff's copyright claims. Indeed, even plaintiff's marketing strategy, as alleged in both
19 causes of action, is alleged as a "strategy to market material protected by [plaintiff's
20 copyrighted works]." See Best Buy I SAC, ¶¶ 134, 161. In short, there is no real distinction
21 between the marketing strategy that plaintiff alleges was taken improperly, and the
22 copyrightable material that plaintiff alleges was infringed. As such, the court concludes that
23 plaintiff improperly seeks protection of his copyrighted works through its fourth and sixth
24 state law claims, and those claims are hereby preempted. See Kodadek, 152 F.3d at
25 1212-13 (holding § 17200 claim preempted by Copyright Act); see also Del Madera Props.
26 v. Rhodes & Gardner, 820 F.2d 973 (9th Cir.1987)(holding unjust enrichment claim alleging
27 "misappropriation" preempted by Copyright Act), overruled on other grounds in Fogerty v.
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1 Fantasy, Inc., 510 U.S. 517 (1994).

2 With respect to plaintiff's fifth cause of action for breach of implied contract,
3 however, the court does not find the claim preempted, for plaintiff's allegations are sufficient
4 to set forth a Desny claim. See Desny v. Wilder, 46 Cal. 2d 715, 739 (1956). In Desny, the
5 court allowed an implied breach of contract claim to go forward in connection with federal
6 copyright claims, on the basis that a promise to pay reasonable compensation for an "idea"
7 that is otherwise not protectable under copyright law can be the basis for the state law
8 claim. The Ninth Circuit has endorsed Desny claims, holding: "To establish a Desny claim
9 for breach of implied-in-fact contract, the plaintiff must show that the plaintiff prepared the
10 work, disclosed the work to the offeree for sale, and did so under circumstances from which
11 it could be concluded that the offeree voluntarily accepted the disclosure knowing the
12 conditions on which it was tendered and the reasonable value of the work." See Grosso v.
13 Miramax Film, 383 F.3d 965, 967 (9th Cir. 2004)(holding Desny claim was stated where
14 plaintiff alleged that "idea" in question "was submitted by Plaintiff to Defendants with the
15 understanding and expectation, fully and clearly understood by Defendants that Plaintiffs
16 would be reasonably compensated for its use by Defendants").

17 Here, plaintiff's claim for breach of implied contract sufficiently alleges the extra
18 element of an implied promise to pay for the ideas inherent in the Submarine spot, such
19 that preemption is avoided for purposes of this motion. See Best Buy I SAC, ¶ 151.
20 Plaintiff is entitled, as are defendants, to develop the factual record further through
21 discovery, and the issue may be raised again at the summary judgment phase.

22 In conclusion, the court GRANTS defendants' motion for judgment on the pleadings
23 with respect to plaintiff's fourth and sixth causes of action on preemption grounds, and
24 DENIES the motion with respect to plaintiff's fifth cause of action.

25 5. Merits of State Law Claims

26 In view of the court's decision to grant judgment on the pleadings in favor of
27 defendants with respect to plaintiff's fourth and sixth causes of action, the court need not,
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1 and does not, reach the parties' arguments with respect to the merits of those state law
2 claims.

3 With respect to plaintiff's fifth cause of action for breach of implied contract,
4 however, defendants assert that the claim should be dismissed for reasons other than
5 preemption. Specifically, defendants contend that the claim should be dismissed because
6 (a) plaintiff lacks standing to assert claims for idea misappropriation; (b) the parties'
7 licensing agreement grants defendants the right to use the marketing strategy; and (c) the
8 claim is barred by the statute of limitations.

9 a. standing

10 The Best Buy defendants contend that plaintiff lacks standing to allege any claim
11 based upon its purported marketing strategy, since the marketing strategy belongs to Mr.
12 Janssen, not plaintiff Identity Arts, and plaintiff nowhere alleges that Mr. Janssen ever
13 transferred to Identity Arts any interest in the marketing strategy.

14 As plaintiff points out, however, the SAC alleges that in August 2002, Mr. Janssen
15 helped found Identity Arts and simultaneously transferred "all his legal rights in material
16 protected by [the copyright for the Submarine spot script]" to the new company. See Best
17 Buy I SAC ¶ 23. The SAC also alleges that Mr. Janssen assigned any and all of his
18 remaining rights in material protected by the copyright for the Submarine spot itself, in
19 February 2006. See id. at ¶ 73. The court finds these allegations sufficient to allege
20 plaintiff's standing to sue for breach of implied contract with respect to plaintiff's marketing
21 strategy, which is based in part on the copyrighted material of the Submarine spot script,
22 and the Submarine spot.

23 Accordingly, the court declines to find that plaintiff lacks standing with respect to is
24 claim for breach of implied contract.

25 b. licensing agreement

26 Next, defendants assert that plaintiff cannot base its claim for breach of implied
27 contract on the alleged marketing strategy, because the Licensing Agreement between the
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1 parties expressly grants defendants the right to use plaintiff's marketing strategy.

2 Accordingly, defendants argue, plaintiff should be estopped here from bringing an action
3 based on allegations that contradict the express terms of the Agreement.

4 Defendants' argument is unpersuasive. Defendants presume that the Agreement's
5 provisions dealing with "cell phone courtesy message commercials," and authorizing
6 defendants to produce their own "message commercials using a theatrical motion picture
7 trailesque theme or style," are tantamount to provisions dealing with – and authorizing use
8 of – plaintiff's alleged marketing idea. See Best Buy I SAC, Ex. B at §§ 1, 4, 5. However,
9 this argument artificially limits plaintiff's alleged marketing strategy to a narrow definition
10 that extends only to "courtesy message commercials using a theatrical motion picture
11 trailesque theme or style," without any justification for doing so. Indeed, all indications in
12 the second amended complaint are that plaintiff has *not* limited its alleged marketing
13 strategy in such a way. Plaintiff alleges only that the marketing strategy was one that
14 involved marketing "the Submarine Spot to cell phone manufacturers, cell phone service
15 providers and movie theatre chains, for use as advertising space," and that the strategy in
16 part covered "material protected by the [copyright registrations]." See Best Buy I SAC, ¶¶
17 26, 150. Accordingly, while plaintiff's alleged marketing strategy *may* include courtesy
18 message commercials using a theatrical motion picture trailesque theme or style, it does
19 not follow from plaintiff's allegations that the two are synonymous.

20 In sum, it does not follow that the Agreements' provisions explicitly address plaintiff's
21 alleged marketing strategy, nor does it follow that plaintiff should accordingly be estopped
22 by virtue of the Agreement from raising a claim for breach of implied contract based on the
23 alleged marketing strategy. Judgment on the pleadings with regard to plaintiff's claim for
24 breach of implied contract is therefore DENIED on these grounds.

25 c. statute of limitations

26 Finally, the Best Buy defendants argue that plaintiff's claim for breach of implied
27 contract is barred because plaintiff failed to bring the claim within the applicable two-year
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1 limitations period. See Cal. Civ. Proc. Code § 339(1). Defendants assert that plaintiff knew
2 that defendants were using its alleged marketing strategy with third parties as of October
3 2003, when the Licensing Agreement between the parties was executed and the final
4 Submarine spot was delivered to defendants. See Best Buy I SAC, Ex. B. However,
5 plaintiff did not file the instant action until November 2005, more than two years later. As
6 such, defendants contend that the claim is untimely.

7 Defendants' argument is unpersuasive. Plaintiff's claim for breach of implied
8 contract accrued at the time of defendants' breach. See Menefee v. Ostawari, 228 Cal.
9 App. 3d 239, 245-46 (1991) ("a cause of action for breach of contract ordinarily accrues at
10 the time of breach regardless of whether any substantial damage is apparent or
11 ascertainable"); In re Estate of Fincher, 119 Cal. App. 3d 343, 352 (1981) ("The general
12 rule is that a suit for breach of an implied agreement accrues at the time of the breach").
13 Here, plaintiff alleges that defendants' breach occurred when they "misappropriat[ed] and
14 us[ed] the marketing concepts, the Rough Cut Submarine Spot, the Submarine Spot and
15 thereby also the Original Elements and material protected [by plaintiff's copyright]." Best
16 Buy I SAC, ¶ 157. As for the date upon which this misappropriation and use actually
17 occurred, plaintiff alleges, contrary to defendants' contention, that defendants' unauthorized
18 use of the Submarine Spot in conjunction with third parties occurred "sometime prior to July
19 2004" – the time around which defendants began airing the three purportedly infringing
20 spots. See id. at ¶ 48. Accordingly, the court concludes that plaintiff has sufficiently
21 alleged that breach occurred in or about July 2004. This brings plaintiff's action well within
22 the two year statute of limitations period applicable to the instant claim.

23 Moreover, where, as here, a plaintiff is alleging a breach of implied contract in
24 connection with misappropriation of an idea connected with copyrighted material, the Ninth
25 Circuit has held that the "latest date upon which [a plaintiff's]breach-of-contract claim[]
26 could have accrued" is the date of defendants' airing of the challenged material. See, e.g.,
27 Kourtis v. Cameron, 419 F.3d 989, 1000 (9th Cir. 2005)(plaintiff's implied breach of contract
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1 claim time-barred where filed more than 10 years after defendant's airing of allegedly
2 infringing material). Here, this means that the latest date upon which plaintiff's claim for
3 breach of implied contract could have accrued is the date of defendants' airing of the three
4 spots in question – the Buffalo, Return of the Kwan, and Pump Up the Movie spots. And
5 since the date of defendants' airing of each of the spots in question is not apparent from
6 the face of plaintiff's complaint, the court requires more information before it can
7 affirmatively rule in defendants' favor regarding the applicable statute of limitations.

8 In sum, the court concludes that plaintiff has sufficiently alleged a timely claim for
9 breach of implied contract for purposes of the instant motion. Judgment on the pleadings
10 with regard to plaintiff's claim for breach of implied contract is therefore DENIED on
11 timeliness grounds.

12 C. Best Buy II

13 The three motions filed by the defendants in Best Buy II largely make overlapping
14 arguments, and are considered together. In sum, all defendants challenge plaintiff GJP's
15 two claims for federal copyright infringement. Only the Best Buy and Sprint defendants,
16 however, challenge GJP's two state law claims. As such, and since the parties respectively
17 raise nearly identical arguments, analysis of all motions boils down to (1) the validity of
18 GJP's federal copyright claims, and (2) the validity of GJP's two state law claims.

19 1. Federal Copyright Claims

20 GJP brings its first copyright infringement claim against all defendants for
21 infringement of GJP's Phone Bomb spot, and brings its second copyright infringement
22 claim against all defendants except Identity Arts, for infringement of GJP's Action Fighter
23 spot. All defendants seek judgment on the pleadings on the basis that there is no
24 substantial similarity among the spots in question.

25 In determining the issue of substantial similarity, the court relies on the legal
26 principles already enunciated in connection with the Best Buy I motion, and applies the
27 extrinsic test established by the Ninth Circuit. In doing so, the court concludes, as stated
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1 below, that as was the case in connection with the Best Buy I motion, the works in question
2 here also reflect a lack of substantial similarity.

3 a. plot

4 Phone Bomb/Submarine spots. First, the court turns to a comparison of plot
5 between the Phone Bomb spot and the Submarine spot. The Phone Bomb spot tells the
6 story of a military-style crew located inside a barracks-like atmosphere, who are called
7 upon to diffuse a bomb. At the crucial moment requiring silence, the actions on screen are
8 interrupted by a ringing cell phone, which leads to the crew's demise. The Submarine spot,
9 as the court has already noted, tells the story of a submarine crew whose silent descent in
10 what appear to be hostile conditions is suddenly interrupted by the sound of a ringing cell
11 phone coming from an off-screen audience. As the crew urgently turns to the audience
12 and attempts to silence the sound, the ringing destroys the silence on screen and dooms
13 the crew.

14 Both spots have some undeniable similarities in plot. For example, both tell the
15 story of a military operation and a crew, which operation is interrupted at a tense moment
16 requiring silence by a ringing cell phone. There are, however, some differences in story
17 line. Phone Bomb takes place in a barracks-like building or atmosphere, and concerns an
18 impending bomb explosion. The Submarine spot, by contrast, highlights a submarine crew
19 who is attempting to escape enemy detection.

20 Moreover, however, the court notes that even if the plots of two works *are*
21 substantially similar, there is no liability if the trier of fact were to conclude that defendant
22 copied only the basic idea, and independently created a similar plot. See, e.g., Data East
23 USA, Inc. v. EPYX, Inc., 862 F.2d 204, 208 (9th Cir. 1988) (similar ideas in two video
24 games). As such, and in view of the differences that are apparent in the story line here, the
25 court concludes that, although the plots are similar, this is not an element that warrants a
26 finding of overall substantial similarity. Rather, the similarities between the spots must be
27 viewed in light of the remaining articulable elements contemplated by the extrinsic test.
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1 Action Fighter/Return of the Kwan. As with the above spots, a comparison of Action
2 Fighter with Return of the Kwan reveals some commonality between the two works, albeit
3 on a broad level. Action Fighter depicts the story of what appear to be kung-fu martial arts
4 fighters. A protagonist hero is forced into combat with villains, and the characters attempt
5 to defeat one another, until at a crucial moment they are interrupted by a ringing cell phone
6 sound. In Return of the Kwan, a hero and villain also meet in combat, and both are also
7 interrupted at the height of the combat by a ringing cell phone heard in the off-screen
8 audience.

9 As with the Phone Bomb/Submarine spots, however, the court concludes that,
10 although these plots, too, are similar in a broad sense, similarity of plot does not warrant a
11 finding of substantial similarity here, particularly in view of the significant differences in the
12 spots, described below.

13 b. theme

14 The parties unsurprisingly dispute the definition of applicable themes in these spots.
15 Defendants assert that Phone Bomb has an urban counter-terrorist theme, and Submarine
16 spot has a naval warfare/submarine theme. Similarly, defendants claim that Action Fighter
17 has a “campy kung fu action movie” theme, while Return of the Kwan has an “exotic/epic”
18 theme. Plaintiff, by contrast, defines the element of theme more broadly, stating that all
19 four spots have the identical theme and message – “that moviegoers should turn off their
20 cell phone during the film or risk facing dire consequences.” See GJP Opp. Br. Re Best
21 Buy II Motion at 11:13-14.

22 Both Phone Bomb and the Submarine spot have similar themes of military activity,
23 danger, and impending death. Action Fighter has a martial arts theme of hand-to-hand
24 combat between hero and villain, as does Return of the Kwan. However, it takes more
25 than these broad similarity in themes to rise to the level of substantial similarity worthy of
26 copyright protection. For, as stated previously, it takes more than general similarities in plot
27 and theme to claim copyright protection – there must be an actual similarity of expression
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1 that is apparent in the overall 'concept and feel' of the works in question. See Litchfield v.
2 Spielberg, 736 F.2d at 1357 ("to constitute infringement of expression, the total concept
3 and feel of the works must be substantially similar").

4 On that note, as plaintiff Identity Arts did in the Best Buy I motion, plaintiff GJP here
5 relies on too broad a definition for the element of theme, in its attempt to prove substantial
6 similarity. While plaintiff is correct that the overall message that all the various spots seek
7 to convey is that cell phone users should refrain from cell phone use during movie
8 showings, this message is part of the overall concept and *idea* for the spots, rather than
9 being expressed as the central theme of each work. More fundamentally, the message
10 that every movie goer can be a "hero" by turning off their cell phones, simply does not rise
11 to the level of an "actual concrete element[]" that make[s] up the total sequence of events
12 and the relationships between the major characters." See, e.g., Metcalf v. Bochco, 294
13 F.3d 1069, 1074 (9th Cir. 2002).

14 c. dialogue

15 Plaintiff relies on a comparison of the catch phrase "it's coming from the audience,"
16 in order to demonstrate substantial similarity in the works before the court. In Phone
17 Bomb, a character exclaims, "it came from the audience," whereas in the Submarine Spot,
18 an on-screen crew member states, "it's coming from the audience." In Action Fighter, the
19 villain states, "some dummy left his cell phone on ... in the audience," while in Return of the
20 Kwan, the villain states in subtitled format, "it's coming from the audience."

21 Plaintiff completely overlooks, however, the fact that aside from this isolated phrase,
22 the overall dialogue is fundamentally different and distinct in each spot. Both Phone Bomb
23 and Action Fighter involve a much larger volume of dialogue that helps to develop the story
24 line, and the dialogue is more complex. In Submarine spot and Return of the Kwan, by
25 contrast, the dialogue is minimal and perfunctory. While this is largely due no doubt to the
26 length attributed to each spot (Phone Bomb and Action Fighter are longer spots), the fact
27 remains that viewing the dialogue of all spots as a whole, there are more differences than
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1 there are similarities. Moreover, there is a more fundamental issue that plaintiff overlooks.
2 It is the fact that there is no copyright protection that can be extended to short words and
3 phrases such as the single phrase that plaintiff focuses on here. See, e.g., Narell v.
4 Freeman, 872 F.2d at 911 (“Ordinary phrases are not entitled to copyright protection.”); see
5 also 37 C.F.R. § 202.1(a)(words and short phrases are not subject to copyright).

6 In short, the court finds no substantial similarity of dialogue here, based on the
7 distinctive differences in the dialogue of all four spots as a whole, which differences
8 overshadow the use of the one brief similar phrase by each spot.

9 d. mood/setting

10 The mood and setting of all four spots in question are distinct. In Phone Bomb, the
11 mood is dramatic and tense, as the storyline plays out in the setting of a barracks-like
12 operation. As the story opens, the main on-screen character is seen disembarking from a
13 helicopter on a rooftop. In the Submarine spot, by contrast, while the mood is tense, it also
14 invokes a sense of confinement missing from Phone Bomb, as the setting for the story is
15 the interior of an underwater submarine in the deep Pacific Ocean.

16 The differences between Action Fighter and Return of the Kwan are even more
17 striking. Action Fighter depicts a martial arts story line taking place in a warehouse. The
18 mood is comedic, with exaggerated characters and techniques that invoke a sense of
19 humor and laughter. The mood and setting for Return of the Kwan could not be more
20 different. The spot takes place in an Asian village and on a lake, with the surrounding
21 wilderness as a backdrop. The mood is that of an epic in the fashion of ‘Crouching Tiger,
22 Hidden Dragon.’ It is somber, and serious.

23 In sum, the court does not find that any of the spots in question exhibit substantial
24 similarity of either mood or setting.

25 e. pace

26 With respect to pace, too, the spots in question are dramatically different. Phone
27 Bomb exhibits a rapid, quick-moving tempo that is consistent throughout, while Submarine
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1 spot exhibits a slower tempo that speeds up towards the end, as the crew members
2 urgently attempt to silence the off-screen cell phone. Furthermore, the Phone Bomb spot,
3 at approximately two minutes, is significantly longer than the Submarine Spot, at
4 approximately 35 seconds, a factor that highlights the disparity in pace between the two.

5 As for Action Fighter, it has a quick, light hearted tempo consistent with a comedy
6 spot. Return of the Kwan, by contrast, has a slower, somber tempo that is more consistent
7 with a dramatic work. These spots, too, have distinctive running times that highlight
8 disparities in tempo, with Action Fighter running for approximately one and a half minutes,
9 compared to Return of the Kwan's 45 seconds.

10 In sum, the court finds that no substantial similarity is exhibited with respect to pace
11 of the works in question.

12 f. characters

13 Plaintiff GJP defines the characters in Phone Bomb and Submarine as "military
14 personnel struggling to avoid destruction and death," and the characters in Action Fighter
15 and Return of the Kwan as "martial arts experts, one a hero and the other a villain,
16 engaged in hand-to-hand martial arts combat." Defendants, by contrast, point out that the
17 characters must be defined more narrowly than that. In Phone bomb, the characters
18 included the lead member of the bomb squad, and uniformed troops in and around the
19 building, while in Submarine, the characters were all naval submarine crew members. In
20 Action Fighter, there was one primary hero and two villains, whereas in Return of the Kwan,
21 there were warriors on horseback, and female villager, and the two characters alone
22 fighting on the lake.

23 The court finds the characters sufficiently distinct in all spots such as to preclude
24 support for a finding of substantial similarity with regard to this element. The spots employ
25 different characters, none of which is, in appearance, similar to any other. While it is true
26 that the genre of character may be similar (i.e., martial arts fighter), this is not enough to
27 support a finding that the characters themselves are similar.

1 Accordingly, the court finds that plaintiff cannot demonstrate substantial similarity of
2 characters in connection with the spots at issue.

3 g. sequence of events

4 Plaintiff here makes many of the same arguments with respect to sequence of
5 events, as did plaintiff Identity Arts in Best Buy I. Namely, plaintiff here contends: that in
6 all four spots, the audience is introduced to the major characters, and informed of the need
7 for silence and concentration; that at a crucial moment in the spots, a cell phone ringing is
8 heard, panic and/or distraction ensues, and the on-screen characters realize that the
9 ringing is coming from the audience; that the on-screen characters break the fourth wall,
10 inform the audience that the ringing sound is coming from the theater; and that the
11 characters on-screen are eventually undone by the ringing. Plaintiff also asserts that the
12 spots in question utilize similar format and editing, as well.

13 As was the case with regard to plaintiff's argument in Best Buy I, the sequence of
14 events that plaintiff describes here is not sufficiently unique or concrete enough to warrant
15 copyright protection. Rather, here, too, plaintiff defines the scope of copyright protection
16 too broadly, and impermissibly seeks protection for the general idea, or concept, of a movie
17 or film spot whose true nature is a cell phone courtesy message, instead of seeking
18 protection for plaintiff's own *expression* of the same idea. See, e.g., Berkic, 761 F.2d at
19 1293 ("[g]eneral plot ideas are not protected by copyright law; they remain forever the
20 common property of artistic mankind.").

21 In other words, plaintiff is attempting to seek protection for elements that naturally
22 follow from the idea of a cell phone courtesy message masquerading as a short film piece.
23 A short film piece, for example, would use similar editing and formatting as that in evidence
24 here, with quick shots of differing scenes being utilized to advance the storyline quickly.
25 Similarly, the breaking of the fourth wall is a well-recognized cinematic technique, not a
26 unique or concrete element susceptible of copyright protection. In short, plaintiff is really
27 seeking protection for natural scenes a faire that flow from the use of the cinematic format,
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1 as described in connection with the Best Buy I motion. As such, the court finds that no
2 substantial similarity between the works in question can be premised on plaintiff's use of
3 the above sequence of events.

4 In conclusion, and in view of all the differences noted above, the court finds that
5 there simply cannot be said to exist any substantial similarity between the Phone
6 Bomb/Submarine spots, or the Action Fighter/Return of the Kwan spots.

7 As did plaintiff Identity Arts in Best Buy I, plaintiff GJP here attempts to avoid the
8 court's conclusion by arguing that, even if not individually protectable, a unique or creative
9 combination or sequence of elements can nonetheless be protected. GJP points to the
10 same cases as Identity Arts did in Best Buy I (e.g., Open Source Yoga Unity), as well as
11 the Ninth Circuit's decision in Metcalf v. Bochco, 294 F.3d 1069. Metcalf does stand for the
12 proposition that, even if not individually protectable, "the presence of so many generic
13 similarities and the common patterns in which they arise" can make a particular sequence
14 protectable. See id. at 1074. However, in Metcalf, the "many" generic similarities and
15 patterns present in the works in question were much more voluminous and specific than in
16 this case. The Metcalf court, for example, considered an original screenplay that had
17 purportedly been infringed by defendant, who had read the screenplay three times, and
18 then had produced his own screenplay based on the same plot. Defendant's screenplay
19 had the same setting in the same location and city as plaintiff's, dealt with identical issues,
20 had similar looking characters in identical professions, facing the identical challenges. The
21 sequence of events and happenings in both works was identical, complete with the
22 presence of similar outside characters who enter into the plot. Id. at 1073-74. In view of
23 the "cumulative weight" of these similarities, the court found the extrinsic test satisfied. Id.

24 Here, by contrast, there is no such cumulative weight. While there are a few striking
25 similarities to be sure (cell phone ringing, "it's coming from the audience"), the fact remains
26 that the works have nothing else in common aside from a broad general plot or theme
27 (military, and martial arts). The characters, sequence of events, mood, duration, and actual
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1 story lines are different. For that reason, not even plaintiff's argument that it is the
2 sequence of elements that makes the works protectable, can help plaintiff.

3 Indeed, just as in Best Buy I, the overall conclusion to be reached here is that
4 plaintiff is attempting to claim an overly broad protection for a general genre of cleverly
5 disguised movie trailers involving a ringing cell phone and exhortation to patrons not to use
6 their cell phones. As such, there is simply no substantial similarity of protected expression
7 here that can support an infringement claim with respect to either of plaintiff's spots.

8 In sum, there is simply no basis for finding – even taking all the pleading allegations
9 as true – that defendants' two works in question contain elements substantially similar to
10 the protectable elements in plaintiff's own works. As such, plaintiff's copyright infringement
11 claims fail as to both the Phone Bomb and Action Fighter spots, and judgment on the
12 pleadings is GRANTED to all defendants with respect to plaintiff's first two infringement
13 claims.

14 2. State Law Claims

15 Defendants Best Buy and Sprint also challenge GJP's two state law claims alleging
16 breach of implied contract and unjust enrichment. Specifically, they challenge these claims
17 on the basis that they are (a) barred by the statute of limitations, and (b) preempted.

18 a. Statute of Limitations

19 Both parties agree that the relevant statute of limitations for both state law claims is
20 2 years. Defendants, however, assert that the 2 year limit has been violated. They ask the
21 court to take judicial notice of the second amended complaint in Best Buy I, and the fact
22 that this related complaint states that the allegedly offending films began airing on
23 November 21, 2003. See Best Buy I SAC, ¶ 44. Since plaintiff's Best Buy II complaint was
24 not filed until December 2005, however, the statute of limitations bars the claim. In
25 response, GJP challenges the facts that defendants seek to have judicially noticed, and
26 states that it requires fact-based discovery in order to oppose the statute of limitations
27 argument.

1 Preliminarily, the court notes that, while it is entirely proper to take judicial notice of
2 the Best Buy I complaint, and even of the fact that certain facts are alleged in it, it is not
3 appropriate for the court to take judicial notice of those facts for their substantive truth. To
4 that end, although the Best Buy I plaintiff alleges that November 21, 2003 was the release
5 date for the Submarine Spot, this is an allegation that the court declines to judicially notice
6 for its substantive truth in this action. Defendants here urge the court to take notice, in the
7 alternative, of Exhibit G to the first amended complaint in the Best Buy I action – a press
8 release dated November 21, 2003, stating that the marketing campaign was to begin airing
9 during the “holiday” season. However, even if the court utilized its discretion to take notice
10 of a press release attached as a complaint exhibit on a 12(c) motion, the press release
11 itself is of little value in establishing a relevant date of airing. The press release, for
12 example, states only that the new marketing program would hit “the big screen along with
13 this year’s holiday blockbuster movies.” This could mean December 2003 just as easily as
14 it could refer to a date sometime in November. If in December, the statute of limitations
15 would have begun running later than the time contended by defendants, making plaintiff’s
16 complaint here timely. In short, there is insufficient information before the court on this
17 motion, for the court to conclude that the claims should be dismissed as untimely.⁶

18 Moreover, given the lack of clarity with respect to the factual issues regarding the
19 airing date of both of plaintiff GJP’s spots, the court deems this to be an issue more
20 appropriately addressed with a more developed factual record. The parties and the court
21 will be in a better position to assess the validity of any arguments going to the statute of
22 limitations issue after adequate discovery on the issue.

23 In sum, the court denies defendants’ request for judgment on the pleadings as to
24 plaintiff’s two state law claims, on the basis that the claims are untimely.

26 ⁶ Furthermore, the court notes that there is no release date alleged at all in the
27 Best Buy I complaint in connection with the Return of the Kwan spot, only the Submarine spot,
28 further demonstrating that the court has insufficient information upon which to determine the
statute of limitations issue.

b. Preemption

Defendants also contend that both state law claims – for implied breach of contract, and unjust enrichment – are preempted by the Copyright Act. As mentioned above in connection with the Best Buy I motion, preemption occurs if two conditions are met: the work of authorship falls within the subject matter of the Copyright Act; and the rights that the state law protects are equivalent to those protected by the Copyright Act. See Kodadek, 152 F.3d at 1212; see also Downing, 265 F.3d at 1003. As defendants point out, an exception occurs where a state law claim contains some element not shared by federal law “that changes the nature of the action so that it is qualitatively different from a copyright infringement claim.” See, e.g., Summit Machine Tool Mfg. Corp. v. Victor CNC Sys., Inc., 7 F.3d 1434, 1439-40 (9th Cir. 1993).

First, with respect to plaintiff’s claim for implied breach of contract, GJP asserts that the qualitatively different element alleged is that of defendants’ agreement to pay for the use of “ideas and concepts.” See Best Buy II SAC, ¶ 65. Specifically, it alleges that at the November 1, 2000 meeting attended by Best Buy and Sprint, plaintiff disclosed Phone Bomb and Action Fighter “with the understanding and expectation, fully and clearly understood by defendants Best Buy and Sprint, that plaintiff would be reasonably compensated for their use by defendants.” Id. at ¶ 62.

Similar to the conclusion reached by the court regarding this issue in Best Buy I, these allegations are sufficient to set forth a Desny claim, in which the court allows an implied breach of contract claim to go forward on the basis that a promise to pay reasonable compensation for an “idea” that is otherwise not protectable under copyright law can be the basis for a state law claim. See Desny, 46 Cal. 2d at 739; see also Grosso, 383 F.3d at 967.

Here, GJP makes precisely the same allegations as that put forth in Grosso. Accordingly, GJP’s state law claim sufficiently alleges the extra element of an implied promise to pay for the ideas inherent in the Phone Bomb and Action Fighter spots, such

1 that preemption is avoided. Defendants attempt to avoid this result by asserting that GJP
2 still fails to allege a “meeting of the minds” with respect to any promise to pay for the ideas
3 in question. While appealing at first blush, this argument does not take Grosso properly
4 into account. Grosso considered the identical allegations as those made by plaintiffs here,
5 and the Ninth Circuit held those allegations sufficient. Accordingly, a Desny claim has been
6 properly stated.

7 The unjust enrichment claim, however, requires a different result. Not only are
8 plaintiffs’ arguments against preemption extremely weak, in Grosso, although the Ninth
9 Circuit allowed an implied breach claim to go forward, it also noted that the Ninth Circuit
10 has previously “held that a claim for unjust enrichment was equivalent to a claim for
11 copyright infringement, and thus preempted, because the claim lacked an extra element –
12 the bilateral expectation of compensation.” Grosso, 383 F.3d at 968. So here. Plaintiff
13 GJP’s allegations, even though sufficient to state a claim for implied breach of contract
14 under Desny, cannot state a claim for unjust enrichment. Accordingly, the unjust
15 enrichment claim is preempted.

16 In conclusion, with respect to Best Buy II, GRANTS judgment on the pleadings in
17 favor of defendants with respect to plaintiff’s first, second, and fourth causes of action.
18 Judgment on the pleadings is DENIED with respect to plaintiff’s third cause of action for
19 breach of implied contract.

20 C. Conclusion

21 For all the above reasons, the court hereby: GRANTS judgment on the pleadings in
22 favor of defendants with respect to plaintiff’s first, second, third, fourth, and sixth causes of
23 action in the Best Buy I action; DENIES judgment on the pleadings with respect to plaintiff’s
24 fifth cause of action in the Best Buy I action; GRANTS judgment on the pleadings in favor
25 of defendants with respect to plaintiff’s first, second, and fourth causes of action in the Best
26 Buy II action; and DENIES judgment on the pleadings with respect to plaintiff’s third cause
27 of action in the Best Buy II action.

1 A case management conference will be held in order to re-calendar dates previously
2 vacated. The parties shall contact the court's courtroom deputy to schedule an in person
3 or telephonic conference, to occur in May 2007.

4
5 **IT IS SO ORDERED.**

6 Dated: April 18, 2007



PHYLLIS J. HAMILTON
United States District Judge